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HAROLD B. WILLEY,

No. 515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

ALFRED LEE WEINBERG and MORGAN BIRD, SR.,
Petitioners,

vs.

UNITED STATES OF AMERICA.

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1955

ALFRED LEE WEINBERG and MORGAN BIRD, SR.,
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vs.

UNITED STATES OF AMERICA.

CONSOLIDATED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed their conviction for conspiracy to defraud the United States in violation of Section 371 of Title 18 United States Code.

(a) The opinion below

The opinion of the court below has not yet been officially reported. Copy thereof is hereto annexed (See pp. 29-49, *infra*). The opinion of the trial court denying the motions for new trial, arrest of judgment and judgment of acquittal is reported at 129 F. Supp. 514. The opinion of the trial judge denying petitioners' motions to dismiss the indictment is unreported and is set forth in the appellants' appendix filed in the court below (21a).

(b) Statement of grounds of jurisdiction

(i) The judgment of the Court of Appeals was rendered and entered on September 23, 1955.

(ii) Timely application for rehearing was made on October 7, 1955 and was denied on October 14, 1955.

(iii) The jurisdiction of this Court is invoked pursuant to Rule 37 (b, 1) of the Federal Rules of Criminal Procedure, 18 U.S.C., and 28 U.S.C. Sec. 1254 (1).

(c) Questions presented for review

(1) May a defendant be required to stand trial and a conviction be sustained on an indictment framed in the general language of the Federal Conspiracy Statute (18 U.S.C. Sec. 371) which fails to: (a) aver a violation of a substantive statute or regulation; (b) aver facts charging the commission of any dishonesty, misrepresentation or concealment; or (c) aver substantive facts with certainty?

(2) May a transcript of testimony of a witness or an alleged co-conspirator before the grand jury be offered as independent affirmative evidence and then used to impeach a witness or refresh his recollection without: (a) previously laying a foundation for impeachment; (b) instructing a jury as to its limitations; and (c) permitting counsel for the accused at time of trial an opportunity to inspect the transcript of the witness only?

(3) In an indictment charging conspiracy to defraud the United States by the formation of a purchasing corporation which purchased at wholesale and sold to the public at manufacturers' list price as well as to corporate schools wherein veteran trainees were enrolled in which the accused were stockholders: (a) was it prejudicial error to receive testimony pertaining to alleged independent,

unrelated crimes in which neither the purchasing corporation nor one of the petitioners was involved; and (b) in refutation thereof, was it error to exclude itemized receipts received and prepared in accordance with contracts between the schools and the Veterans' Administrator and in accordance with his regulations?

(4) Where a lawyer acquired confidential information from his clients in a professional capacity and not in the furtherance of crime, may he disclose it without their waiver in a criminal conspiracy trial before a *prima facie* case has been established?

(5) Did the court commit prejudicial error in its charge when it: (a) instructed the jury that notwithstanding the indictment named five co-conspirators, it could not acquit one of the two defendants without the other; (b) failed to instruct the jury on vital issues as to which it had expressly said during the course of the trial that it would?

(6) Did the repeated interruptions, remarks and rulings of the trial court offend against the constitutional guarantee of a fair trial?

(d) The constitutional provisions and statutes involved

[U. S. C. A., Const. Amend. V and VI; 62 Stat. 701, 18 U. S. C. Sec. 371; 62 Stat. 945, 28 U. S. C. Sec. 1732; Code of Federal Regulations, title 38, Sec. 21.539 Par. [g] [4] and Penna. Act of 1887 P. L. 158 Sec. 5 cl. [d], 28 Purdons Statutes, Sec. 321] are set forth in Appendix B, *Infra* pp. 50-52.

(e) Statement of the Case

The petitioners were convicted and sentenced on an indictment of one count returned on October 19, 1950. The indictment charged that on or about December 1, 1948, and

continuing to the date of the indictment, petitioners conspired with each other and with Arthur B. Jenkins, John F. Yekel and Louis Shaffer, named as co-conspirators but not indicted, to defraud the United States out of certain moneys. The gist of the indictment was that petitioners, being stockholders in certain corporate schools, organized an independent and separate corporation, purchased goods at wholesale, and sold to the schools at prices in excess of which they could have purchased in the open market place (13a). Petitioners were each sentenced to pay a fine of Five Thousand Dollars and be committed to prison, Alfred Lee Weinberg for a term of two years (p. 481a) and Morgan Bird, Sr. for a term of one year and one day (p. 482a).

1. Petitioners entered pleas of not guilty to the indictment and separately filed motions to dismiss contending that the indictment did not charge a crime, particularly since it contained no averments of fact charging a violation of any substantive statute or federal regulation; that it failed to set forth any facts showing dishonesty, falsity, or misrepresentation and that it was in violation of the Sixth Amendment to the federal constitution. The motions to dismiss were denied by memorandum opinion (21a). At the end of the Government's case, petitioners again moved to dismiss the indictment on the ground, *inter alia*, that it not only failed to sufficiently charge a crime, but that there was no evidence to show the violation by the petitioners of any statute or regulation. The trial judge overruled the motion, holding that there need not be a violation of any statute or regulation but that the crime was in the conspiracy (232a). The court below sustained the indictment, holding that the crime charged need not be a conspiracy to commit an offense against a particular section of the Veterans Act, "but rather an ordinary con-

spiracy to defraud the United States or an agency thereof"; that the vice of the situation was not false entries but the basic wrong of foisting upon the true expense for the schools an unnecessary selling agent which collected an unconscionable profit (*infra*, p. 32).

2. The supply corporation (hereinafter referred to as Mercury) sold to the public generally and to the schools mentioned in the indictment. The prices charged were the regular list prices and the same prices charged to other veteran training schools and the public generally (199a). Mercury's average gross profit on consumable supplies was 31.24% (88a) and on tools was 34.73% (89a) before deducting wages, rent or other operating expenses. There was no evidence of what was its net profit after payment of wages, transportation, interest, advertising, rent and other operating expenses (98a-103a). The schools each entered into written contracts prepared and drafted by Veterans' Administration to supply student trainees with instruction and tools at prices fixed therein by the Veterans Administration (266a). In each instance the schools billed as provided by contract (137a, 183a-188a). Neither Mercury nor the schools were named a party to this indictment. No evidence was introduced to show that the schools did not bill for tools at cost to them; or that they billed at an unreasonable price. There was no evidence that the tuition rate paid to the schools was other than fair and reasonable.

3. During the direct examination of three of the witnesses called by the prosecution, the trial judge was asked by the prosecution to read to each of them in the presence of the jury and over petitioners' objection, excerpts of their respective testimony before the Grand Jury. The trial judge read the same to the witness in the hearing of

the jury with the statement to the jury that he would instruct them later as to its limited purpose and effect (191a, 198a) but in each instance failed to do so, then or later. Nor did the judge or the prosecution state the purpose of receiving such evidence. Requests of defense counsel to inspect the transcript of only the testimony of the witness were denied. Petitioners contended that the inspection should have been allowed so as to enable them to properly cross examine and also ascertain whether such portion of the testimony before the Grand Jury as was read was in proper context. The court below held that while the trial judge evidently overlooked telling the jury how they were to regard the Grand Jury testimony, the failure to do so was not a major error (*infra*, pp. 37, 38 and 40).

4. During the trial, the judge permitted over objection of petitioners, the introduction of testimony of a Government agent as to alleged independent crimes. The indictment charged, in substance, that the petitioners organized an independent and separate supply corporation, purchased goods at wholesale, and sold them to corporate schools in which they had a financial interest at exorbitant prices.

The Government agent, however, was allowed to testify that several months *after the indictment* in this case had been returned, he and other agents had examined purchase invoices of two of the schools, while in possession of the Grand Jury. He stated that from his examination of the purchase invoices of the schools and based in large measure upon the work sheets and conclusions of another agent not called as a witness, it appeared to him that the Veterans' Administration had reimbursed the school for tools purportedly delivered to students in excess of the quantity

purchased by the school. In addition, testimony was also offered by the Government pertaining to an alleged overstatement in a cost statement furnished by another school (Lee) to the Veterans' Administration of the rental of a building occupied by it (313a). For this last alleged crime, only the Petitioner, Weinberg, and the Lee School have been indicted, although not tried. Neither of the petitioners, nor the Northeast School have been indicted for the other alleged crime. The agent conceded that he did not examine the receiving tickets of the school nor the delivery tickets (178a). He was not certain whether he had examined all of the purchase invoices (168a) and conceded that they and the school records had been handled by other agents before him (178a). Petitioners objected to all of this testimony because none of it had anything to do with the issue at hand which, as was stated by the trial judge (139a) and the prosecution (339a), was only the organization of Mercury; much of this testimony was based on hearsay (177a), and the Petitioner Bird had nothing to do with the operation of the schools. The court below, while finding that the testimony related to independent crimes, held it admissible as an integral part of the overall picture of fraud (*infra*, p. 46).

Having admitted this testimony as to alleged independent, unrelated crimes, the court refused to allow petitioners the opportunity of refuting the same by presenting the original receipts signed by the individual student trainees acknowledging delivery of the tools in question. These receipts were kept strictly in accordance with regulations of the Veterans' Administrator and the contracts between him and the schools and were records made in the regular course of business. The trial judge excluded them as hearsay and on the further ground that it involved a collateral issue (243a).

5. Attorney Louis Shaffer, named as co-conspirator in the indictment but not indicted, was called as a witness by the prosecution (36a). Over objection by petitioners to the admission of his testimony because he formerly had been their personal counsel (37a, 57a) and they had not waived their privilege (38a), Shaffer was allowed to testify to confidential and privileged communications notwithstanding *prima facie* proof of the conspiracy had not yet been established (39a). The trial judge overruled the objection stating that the witness "* * * is also a co-conspirator" (37a). In his opinion, denying petitioners' motions for judgment of acquittal and new trial, however, he held that Shaffer was not a co-conspirator (476a, 477a, 129 F. Sup. 514, 526). The court below held that there was no error since it was of the opinion that prior to Shaffer's testimony, the Government had made a *prima facie* showing of conspiracy between the two defendants (*infra*, p. 45).

6. At the inception of its instructions to the jury, the trial judge read the indictment to them wherein it was charged that the petitioners and three others named therein, but not indicted, had conspired to defraud the United States (366a). Later, he instructed the jury as follows (377a):

> "May I say to you in this case that there are two defendants. You cannot convict one and acquit the other. You must either acquit the two or none at all, or convict the two or none at all. In other words, one person alone cannot commit conspiracy."

The form of verdict submitted to the jury was predicated on this instruction which was repeated, in substance, at the close of the charge (405a). The court below held that even assuming the trial judge was in error in this part of his charge, it was a mistake favorable to the defense and was, therefore, not reversible error (*infra*, p. 45).

During the trial, the court on many distinct and separate occasions expressly informed the jury that it would appropriately instruct them concerning the use, purpose and effect of testimony, particularly that given before the Grand Jury, and documents admitted into evidence. This it failed to do.

When it overruled petitioners' objection to the reading of excerpts of Shaffer's testimony before the Grand Jury, the trial judge informed the jury it would give them appropriate instruction as to whether or not one defendant was bound by the other and the complete law relative thereto (57a). In connection with the testimony of Attorney Shaffer, the court informed the jury that questions had arisen concerning confidential relationships between lawyers and clients, when that relationship ends and when the privilege is not present, and that he would give them appropriate instructions at a later time (62a). When the trial judge overruled petitioner Bird's objection to the reading of excerpts of Weinberg's testimony before the Grand Jury, the trial judge again stated he would give the jury appropriate instructions later as to the binding effect of statements of one alleged co-conspirator upon another. In each of these instances, he failed to do so.

During the trial, the trial judge, without objection by Government counsel, repeatedly and unnecessarily interrupted and argued with counsel for the petitioners (234a-235a; 353a-359a). He frequently, without cause, or objection of the Government, interrupted and argued with counsel in their opening and closing statements (236a, 237a, 240a, 241a, 351a).

(f) Jurisdiction of the Court Below

The district court had jurisdiction under 18 U. S. C. sec. 371 and 18 U. S. C. sec. 3231. The Court of Appeals had jurisdiction under 28 U. S. C. sec. 1291.

(g) Reasons for allowance of the writ

As to Question I:

This case presents a number of issues which have wide application upon the guarantees set up by the Federal Constitution to protect a citizen against the deprivation of his liberty without due process of law. In the first instance, there is involved the basic question of whether a man may be charged and convicted of a conspiracy to defraud when: (1) his conduct is not in violation of any federal substantive statute or federal regulation; (2) he has committed no falsity, dishonesty, or misrepresentation; and (3) the standard of conduct to which he is criminally held is entirely unknown to him but created by the court at trial. Important questions of federal law are involved which should be settled by this Court.

The court below has sustained a departure by the trial court from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision and, in doing so, it has rendered a decision in direct conflict with the applicable decisions of this Court on an important question of federal law which could have far reaching consequences on the constitutional rights of any citizen charged with a crime.

In United States v. Cohen Grocery Company, 255 U. S. 81, 65 L. Ed. 516, this Court declared unconstitutional the Lever or National Defense Act passed in 1917 to prevent

profiteering. The Act declared it unlawful to "make any unjust or unreasonable rate or charge in handling or dealing in any necessaries". This Court quashed the indictment because the standard of conduct set up in the statute was vague and did not sufficiently inform persons of the nature and accusations they might be called upon to face, holding (p. 89):

> "In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts *detrimental to the public interest* when *unjust and unreasonable* in the *estimation of the court and jury.*" (Emphasis ours.)

In the instant case, the injustice of the situation is more striking since here there is an effort to punish conduct not declared detrimental to the public interest by any statute, but which has been held unreasonable merely in the estimation of the court and jury. In affirming the conviction, notwithstanding the crime charged in the indictment "is not a conspiracy to commit an offense against a particular section of the Veterans Act" (*infra,* p. 31) or a federal regulation, the court below rested its decision on the proposition that, in its opinion, petitioners had organized a "corporate middleman" which was "an utterly unnecessary selling agent which collected an unconscionable profit" (*infra,* p. 32).

This is the type of standard set up by the court without benefit of any prohibitory statute or regulation which this Court denounced in Cohen v. United States, *supra.* It leaves to the trier of the facts and the court the responsibility of fixing a standard by which guilt should be determined, a standard which would vary according to the

views of the various courts and juries. No citizen could feel free in a transaction, particularly with any Government agency, if thereafter, a party or another department of the Government, as in this case, was of the opinion that the profit derived was unreasonable or unconscionable. A person could never know until he was tried and convicted whether his profit in a transaction was fair or unreasonable; whether, under the circumstances, he was a necessary or unnecessary middleman; whether or not he was committing a crime.

That the charge here is *conspiracy* rather than a charge of violating a substantive statute does not alter the inherent danger and injustice and validate the indictment. Such an argument was proposed by the Government in Weeds v. United States, 255 U. S. 109, 65 L. Ed. 537, which also construed the National Defense Act of 1917, but this Court again, in an opinion written by Mr. Chief Justice White, held the indictment defective for substantially the same reasons laid down in Cohen Grocery Company v. United States, *supra*, stating (p. 111):

> "* * * the charge as to conspiracy to exact excessive prices is equally as wanting in standard, and equally as vague as the provision as to unjust and unreasonable rates and charges dealt with in the Cohen Case * * *."

The indictment here, however, is defective for reasons that also offend the federal constitution and contravene the decisions of this Court. This Court had held, citing the Sixth Amendment, that "In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation'." United States v. Cruikshank, 92 U. S. 542, 557; 23 L. Ed. 588, 593.

Accord: Berger v. United States, 295 U. S. 78, 55 S. Ct. 629.

This, according to United States v. Cruikshank, *supra,* has been construed to mean that the indictment must set forth the offense with clearness and certainty, to apprise the accused of the crime with which he stands charged.

The instant indictment resorts to bland and comparative generalizations, alleging that Mercury purchased goods "at exorbitant and inflated prices in excess of the prices payable in the open market place" (13a). It alleges that "it was understood" that the costs to be charged would be the actual, real, true and accurate costs (paragraph 3, 11a) which the Government contends were the costs at which Mercury purchased and not the price paid by the school. The "lowest possible cost" is not defined; the measure of an "exorbitant and inflated" price is not set forth; who and how "it was understood" and where and what is "the open market place" is not stated. Neither the indictment nor the proof sustained knowledge by petitioners of any wrongdoing. References to a violation of any specific regulation or statute are carefully avoided. This Court has held that an indictment based upon a violation of administrative rules which are not clear and explicit may not be sustained, holding in M. Kraus & Brothers v. United States, 327 U. S. 614, 621, 622; 66 S. Ct. 705, that:

> "The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action."

No facts, apart from a general conclusion, are set forth in the indictment showing commission of any fraud and

the factors of dishonesty, misrepresentation and concealment are conspicuously absent. It is settled under the decisions of this Court, that even if the object of a conspiracy was unlawful, if the means employed to effectuate its purpose are not fraudulent, then no prosecution is permissible.

> "One may be subjected to punishment for crime in the Federal courts only for the commission or omission of an act defined by a statute, or by a regulation having legislative authority, and then only if punishment is authorized by Congress."

Viereck v. United States, 318 U. S. 236, 241; 63 S. Ct. 561. Nor is the mere allegation in the general language of the conspiracy statute that defendants conspired to defraud the United States sufficient of itself to charge an offense since the indictment fails to otherwise state facts which brings defendants' conduct within the provisions of a substantive federal statute. A holding that the Act denounced need not be in violation of any statute but in the conspiracy itself (232a) is clearly contrary to the decision of this Court in United States v. Biggs, 211 U. S. 507, 521; 29 S. Ct. 181, and Keck v. United States, 172 U. S. 434, 437; 19 S. Ct. 254; and it is in direct conflict with the decisions of the Second and Eighth Circuit wherein it has been held that the mere allegation that the defendants conspired to defraud the United States in the general language of the conspiracy statute (18 U. S. C. 371) is not sufficient of itself to charge an offense unless it also avers facts within the provisions of some other Act of Congress. Fulbright v. United States, 91 F. 2d 210 (CA 8); United States v. Ausmeier, *et al.*, 152 F. 2d 349, 356 (CA 2).

As to Question II:

Another question presented in this case is directed to a fundamental right of an accused to confront and cross-

examine a witness, particularly a co-conspirator, when he gives testimony. Both of the petitioners herein, were deprived of that inherent and basic right guaranteed by the Sixth Amendment to the Federal Constitution by a decision of the court below which is in direct conflict with the holding of the Court of Appeals for the District of Columbia in Young v. United States, 214 F. 2d 232 (CA DC), of the Eighth Circuit in Rosenthal v. United States, 248 Fed. 684, 686, and of the Ninth Circuit in Kuhn v. United States, 24 F. 2d 910 (CA 9) (Cert. den'd. 278 U. S. 605, 49 S. Ct. 11). Since the effect of that decision is to sustain a departure by the trial court from the accepted and usual course of our judicial proceedings which can have a devastating impact upon the rights of an accused in criminal cases, it calls for an exercise of this Court's power of supervision upon an important question of federal law which, as far as can be ascertained, has not yet been decided by this Court.

The court below affirmed the action of the trial judge in reading aloud to the petit jury the transcript of alleged co-conspirators before the Grand Jury without any statement of purpose and without any foundation having been previously laid for its use. The trial judge, at the request of prosecution, peremptorily read to the petit jury from the transcript of the Grand Jury proceedings questions and answers of alleged co-conspirators, as well as of a disinterested witness, relying on a misconception of this Court's decision in United States v. Socony Vacuum Oil Co., 310 U. S. 150; 60 S. Ct. 811. In that case, however, the stated single reason for the use of the transcript was only to refresh the recollection of the witness. This Court was careful to point out that while the manner in which the Grand Jury transcript had been used was not per se prejudicial since it was used only to refresh the

recollection of the witness, it did not give carte blanche approval of the use of a transcript, stating (p. 234):

> "* * * the grand jury testimony was used simply to refresh the recollection on material facts * * * not as independent affirmative evidence. * * * Furthermore, it was not used for impeachment purposes; * * *"

Thus, that case did not decide the important question raised here of whether testimony of an alleged co-conspirator before the Grand Jury in the absence of an accused and without subjecting the witness to cross-examination may be offered by the Government as substantive, affirmative testimony. In the instant case the transcript was not restricted whatsoever in its use. After it had been read to the jury without any limitation in purpose, the prosecution then attempted to impeach its own witness (198a). The trial court thereupon stated to the jury that "* * * we have just permitted certain questions to be asked and we will give the jury appropriate instructions as to *the only purpose* of the testimony in question at a later time—the *only possible purpose.*" (198a) (Emphasis ours). This it failed to do.

In Young v. United States, *supra,* however, the question was raised and the practice approved of here by the court below was emphatically condemned there, the Court holding (p. 237):

> "This was not refreshing the witness' recollection. It was placing before the trial jury testimony previously given before a grand jury when there had been no cross-examination and defendant was not confronted with the witnesses against him. See U. S. Const. Amend. VI."

Furthermore, there is also presented here the additional and important question involving the right of an accused at trial to inspect the transcript of the witness whose tes-

timony before the Grand Jury is read aloud by the trial court to the petit jury. Without such an inspection, the accused could not know whether the questions and answers were read in proper context, nor could he have been afforded an adequate opportunity to cross-examine.

Although this additional question was raised in the court below, it was not directly decided. However, in affirming the action of the trial court, it thereby approved a practice which is in direct conflict with the decision of the Second Circuit in United States vs. Coplon, 185 F. 2d 629, 638 (CA 2) where the failure to permit inspection by the defendants of certain "wire tap" records offered by the prosecution, was held reversible error in an opinion written by Chief Judge Learned Hand. He observed that although it was "extremely unlikely" that the accused suffered the slightest handicap from the judge's refusal, "* * * we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor." p. 638:

As to Question III:

In permitting petitioners' former attorney to testify, without their waiver, as to confidential matters communicated to him by them before a *prima facie* case of conspiracy had been established, the court below sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. At issue is an important principle of public policy which in Pennsylvania has been incorporated into statute (Act of 1887, P. L. 158, Sec. 5, Cl. (d); 28 Purdon's Statutes, sec. 321) intended to protect confidential communications made to an attorney in his professional character.

While recognizing the general rule as an abstract principle of law, the trial court repudiated it in this case by adopting two inconsistent and contradictory positions. Notwithstanding there was no waiver by the petitioners of the privilege and the Government had not yet established a *prima facie* case of conspiracy as laid down in Clark vs. United States, 289 U. S. 1; 53 S. Ct. 465, the trial court allowed the testimony with the bald statement that he, the attorney, was a con-conspirator (37a). When the charge to the jury relating to co-conspirators was attacked, however, the trial court, thereupon, took the inconsistent and contradictory position that the attorney was *not a co-conspirator.* It held its charge was free from error because none of those named as co-conspirators and not indicted (including Shaffer, the attorney) were involved, stating (476a; 129 F. Supp. 514, 526):

> "* * * There was nothing to show that any of them knowingly participated in any scheme to defraud."

If the Government may name a lawyer in an indictment as a co-conspirator, rely on his testimony as it did in this case, and the court allows his testimony in one breath with the unsupported statement that "he is a co-conspirator" and then, after his testimony is all in, announces its considered opinion that there was nothing to show participation in the conspiracy by the attorney or the other alleged co-conspirators not indicted, the rule is absolutely meaningless. The procedure adopted here of naming defendants' attorney as a co-conspirator, securing his testimony because he was named as a co-conspirator, although a *prima facie* case had not been established first, is an oblique but effective destruction of the principle intended to be safeguarded by public policy and the Pennsylvania statute.

> "There must, of course, be first established a *prima facie* case; the *mere assertion of an intended crime*

or fraud is not enough to release the attorney." (Emphasis ours)

United States v. Bob, 106 F. 2d 37, 40 (CA 2).

As to Question IV:

The decision of the court below is in direct conflict with the decisions of this Court and with the decisions of other courts of appeals in that it sanctions the action of the trial court in permitting Government witnesses to testify as to other alleged crimes not related to the conspiracy for which the petitioners were on trial. There was a striking departure from the accepted and usual course of judicial proceedings, for: (1) not only were the alleged independent crimes wholly unrelated to the issue raised in the indictment, but (2) there was no contention or charge that *the petitioner, Bird,* had anything to do with them; and (3) in each instance, there had been no trial, no conviction, no admission but strong denial. The sanction by the court below of such practice and procedure should call for this Court's power of supervision.

(A) The indictment charges, in substance, that the petitioners were guilty of conspiring to defraud the United States by forming a corporation known as Mercury Distributors, Inc. and by means of it, inflated the costs to be reimbursed to the schools for tools and consumable supplies. Both the trial judge (139a) and the prosecution (339a) observed that the only issue in this case was the *organization of Mercury.*

Nevertheless, testimony was permitted, over objection, concerning the reimbursement to two of the schools for tools purportedly delivered to students in excess of the quantity purchased by the school, apparently for the purpose of proving that the schools had charged the Vet-

erans' Administration for tools not delivered to students (151a, 159a). In addition, testimony was also permitted as to an alleged overstatement in a cost statement furnished by another school (Lee) for the rental of a building occupied by it (313a).

While the court below was satisfied that these might well be independent crimes, it was of the opinion that they were an integral part of the overall picture of fraud. The prosecution, however, neither charged nor contended that either Mercury or Petitioner Bird had anything to do with these alleged transactions. Inasmuch as the independent crimes *did not relate in any way to the organization of Mercury nor to any misconduct* by it or the *petitioner Bird*, it is incomprehensible that they were pertinent to the issue at hand. If such transactions were an important part of the proof of conspiracy alleged in this indictment, either in the body or in the list of overt acts. Nothing of the kind appears. The prejudicial effect of this testimony upon the defendant may be weighed by the extensive testimony concerning those matters and the substantial references to them in the charge of the court (394a-396a) and in the opinion denying a new trial (461a).

The decision of the court below is contrary to the opinion of this Court written by Mr. Justice Harlan in Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, wherein judgment of the court below was reversed, the Court stating (p. 458):

> "They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged."

The decision of the court below is also in direct conflict with the opinion of the Court of Appeals of the Fifth

Circuit in Railton v. United States, 127 F. 2d 691 and of the Second Circuit in United States v. Modern Reed & Rattan Co., Inc., 159 F. 2d 656, wherein it was held that evidence of independent crimes although of the *same nature* as the offense charged were inadmissible. In that case Judge Chase held, (p. 658):

> "They were charged with specific violations of the statute and were entitled to be tried only for those offenses and upon nothing but competent evidence. Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077. The general rule applicable to them is that evidence of the commission of a wholly separate and independent crime even though of the same nature is not admissible."

(B) Having received into the record evidence of alleged independent and unrelated crimes, the petitioners, however, were precluded by rulings of the trial court from introducing vital evidence in rebuttal. This evidence consisted of original receipts for tools given and signed by the individual students. The receipts were kept in accordance with contracts entered into between the schools and the Veterans' Administration, regulations of the Veterans' Administration, and were records kept in the regular course of business. An important related federal question is thus raised here which not only concerns itself with the federal shop book rule but with the meaning and effect of a regulation promulgated by the Veterans' Administration which can have far reaching consequences upon the business relations of the many thousands of persons and firms dealing with the Government. We do not find that this question has been adjudicated and we respectfully submit that it should be settled by this Court. When a government agency such as the Veterans' Administration sets forth in its official regulations that receipts given by veterans for tools delivered to them shall

be *the best evidence* of the delivery of the tools, a trial judge should not be permitted to say that notwithstanding such regulation, it will not be the law in his Court (243a).

As a record kept in the regular course of business as required by the contracts with Veterans' Administration and their regulations, it was also admissible under the Federal Shop Book rule, 28 U. S. C. Sec. 1732. The decision of the court below, therefore, was in conflict with the decision of the Seventh Circuit in United States v. Wicoff, 187 F. 2d 886, and the decision of the Second Circuit in United States v. Garvey, 150 F. 2d 767.

As to Question V:

In approving the charge to the jury that notwithstanding the naming of five co-conspirators in the indictment, it could not acquit one of the two defendants without the other, the court below has rendered a decision on an important federal question in the law of conspiracy which is in direct conflict with the applicable decisions of this Court and the decisions of other Courts of Appeals.

In Rogers v. United States, 340 U. S. 367, 71 S. Ct., 438, this Court pointed out that while two persons are required to constitute a conspiracy, one person can be convicted of conspiracy with persons whose names are unknown. Each petitioner herein, therefore, contends that he was entitled to have a finding of the jury as to his individual connection with the offense charged.

In Prichard v. United States, 181 F. 2d 326 (Cert. den'd. 339 U. S. 974, 70 S. Ct. 1029), the Sixth Circuit and in Martin v. United States, 17 F. 2d 82, the Second Circuit rendered decisions in direct conflict with the decision of the court below here. In Martin v. United States, *supra*,

the trial judge evidently overlooking an indictment of seven men, although only two were on trial before him, instructed the jury that on the conspiracy count "both must or neither could be found guilty". In reversing the lower court, the Court of Appeals for the Second Circuit held (82):

> "That, under the circumstances, this was prejudicial error, needs no more than mention".

Accord: Donegan v. United States, 287 Fed. 641 (Cert. den'd 260 U. S. 751, 43, S. Ct. 251) and Miller v. United States, 24 F. 2d 353 (CA 2).

In Rosenthal v. United States, 45 F. 2d 1000 and in Linde v. United States, 13 F. 2d 59, the Eighth Circuit has likewise reached a result contrary to the decision of the court below in this case. In the latter case, three defendants were indicted for conspiracy and the trial court, in charging the jury, submitted separate forms of verdict for each defendant. The Eighth Circuit observed that (p. 61):

> "Certainly, each defendant was entitled to have a finding of the jury as to his *individual* connection with the offense charged." (Emphasis ours)

In view of the foregoing authorities, many of which were specifically brought to the trial judge's attention before he instructed the jury, we believe basic and fundamental error was committed. The observation of the court below that even assuming the trial judge was in error, "it was a mistake favorable to the defense" (*infra*, p. 43) is, we respectfully submit, contrary to the decisions of other courts of appeals. The jury deliberated in this case for several days, and, at one time, asked to be discharged because they were hopelessly deadlocked. As other courts of appeals have pointed out, each defendant was entitled to a separate finding of the jury *as to his individual connection with the offense charged.* Since this

was denied to them, the mistake in the charge was not favorable to the defense but, on the contrary, was prejudicial error.

Furthermore, the trial court failed to instruct the jury on many vital issues as to which it had expressed its intention to do so. On distinct and separate occasions, it expressly informed the jury that it would appropriately instruct them concerning the use, purpose and effect of testimony and documents admitted into evidence and of statements of counsel. This it failed to do.[2]

Some of the important illustrations are in connection with: (1) petitioners' objections to reading of excerpts of testimony before the Grand Jury (57a); (2) privileged communications to former counsel for the petitioners (62a); and (3) petitioner Bird's objection to the reading of excerpts of petitioner Weinberg's testimony before the Grand Jury.

Contrary to the decision of the court below, the Sixth Circuit, in Schmeller v. United States, 143 F. 2d 544, held that when a court stated it would charge on a vital issue and it fails to do so, it commits prejudicial error notwithstanding counsel has failed to request such instructions. It held (p. 550):

> "We think that the failure to include in its general charge the instruction which the court has assured the defendants would be given was plain and prejudicial error in a matter vital to the defendants, and not waived by the failure to request such a charge after the evidence was concluded."

Likewise, in United States v. Kelinson, 205 F. 2d, 600, the Second Circuit held that (pp. 601-602):

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[2] 26a, 57a, 62a, 109a, 111a, 112a, 126a, 191a, 198a, 298a, 321a, 343a (2), 344a, 345a, 348a, 349a, 350a, 354a, 357a, 360a, 361a, 362a, 363a, T. 1360.

"We think that, in these circumstances, no waiver of the error resulted from any failure to request a cautionary charge. The objections previously made amply sufficed to make known to the judge that these defendants would assert he had erred. Fed. Rules Crim. Proc. Rule 30, 18 U. S. C., does not require a lawyer to become a chattering magpie."

As to Question VI:

The court below has sanctioned a departure from the accepted and usual course of judicial proceedings by the trial court which offended against the constitutional rights of petitioners to a fair trial so as to call for an exercise of this Court's power of supervision, and its decision is in direct conflict with decisions of the other courts of appeals.

It is the duty of a trial judge to preside with entire impartiality, not to take too active a part in developing testimony, entering into discussions with witnesses and particularly, not to inject himself into a trial in a partisan manner. Williams v. United States, 93 F. 2d 685, 687 (CA 9).

In the instant case, the trial judge frequently injected himself as an advocate, made statements extremely prejudicial to the defense and repeatedly interrupted opening and closing statements of each of counsel for the petitioners, in most instances without any request or objection by the prosecution.

It voluntarily interrupted one of counsel in his closing rebuttal on twelve separate occasions. It interrupted other counsel in his closing statement on seven occasions and in several instances engaged in argument with him at that time (354a-355a), all of which was most prejudicial to the defense (351a, 353a-359a). Such activity by the trial

court removed from the case the atmosphere of perfect impartiality necessary in a judicial proceeding (236a, 240a).

Furthermore, immediately upon the conclusion of one of the opening statements, the Court on its own initiative addressed the jury with a highly prejudicial and argumentative statement on a phase of the case which petitioners contended was collateral and irrelevant; and it reemphasized an entirely extraneous and harmful statement made by a Government witness concerning an incident in a school wholly unrelated to the petitioners herein (241a).

It is respectfully submitted that the trial judge interfered with the petitioners' right to a trial by a fair and impartial jury whose consideration of his cause is not influenced by any language of the Court which would create resentment or prejudice against him. While the court below thought the district judge presided without committing substantial error, its opinion appears to be in conflict with the decisions of the Courts of Appeals of the Fifth Circuit and Ninth Circuit wherein similar conduct of the trial judge was held to be reversible error.

In Hunter v. United States, 62 F. 2d, 217, the Fifth Circuit held (p. 220):

> "That the district judge did not intend to be unfair is beside the question. The case was tried in such a way that the jury, in considering as a whole the judge's questions and charge, might well have reached the conclusion that he was not impartial, but was insisting upon a conviction. It is vastly more important, that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid the prosecution and at the same

time appear to the layman on the jury to be impartial."

The Court also made many prejudicial rulings on the evidence which denied to the petitioners an opportunity to fully present their defense and thereby denied to them a fair trial. Some illustrations are: A denial to the petitioners of an opportunity of proving there was no Veterans' Administration regulation or federal statute that forbade the organization and use of a supply corporation (99a-101a, 106a, 260a). They were not allowed to introduce vital evidence to directly rebut testimony concerning alleged independent crimes. They were not allowed to cross-examine Government witnesses to show that prices were administratively and unilaterally determined by Veterans' Administration, and that, therefore, there could be no conspiracy to defraud (139a-150a). The Government, over objection, was permitted to introduce on cross-examination of the petitioner Weinberg, an accountant's statement (Exhibit 70), although unauthenticated and not prepared by the petitioners, as an admission against interest, but he was not allowed on redirect examination to explain the exhibit (311a).

In view of the multiplicity of errors attending the conduct of the trial, although separately regarded by the court below as minor or harmless, we respectfully submit that, regardless of the sufficiency of the evidence as to the guilt of the defendants, they have not had, particularly when the overall aspects of the trial are considered "a fair and impartial trial, that is a trial free from prejudicial error". See United States v. Philips, 217 F. 2d 435, 438 (CA 7); United States v. Raub, 177 F. 2d 312 (CA 7).

Conclusion.

It is respectfully submitted that this case presents important questions on matters of law and procedure which should be authoritatively determined by this Court.

Wherefore, petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

MITCHELL JENKINS,
Counsel for Petitioners.

ROY B. POPE,
Counsel for Alfred Lee Weinberg, Petitioner.

MAX ROSENN,
Counsel for Morgan Bird, Sr., Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 11,573 and 11,574

UNITED STATES OF AMERICA,

v.

ALFRED LEE WEINBERG, MORGAN BIRD, SR.,
Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued June 16, 1955

Before BIGGS, *Chief Judge* and GOODRICH and MCLAUGHLIN, *Circuit Judges.*

OPINION OF THE COURT

(Filed September 23, 1955)

By MCLAUGHLIN, *Circuit Judge.*

The indictment in this matter charged that in connection with certain schools for veterans the defendants did "conspire, confederate and agree together and with each other and with Arthur B. Jenkins, John F. Yekel and Louis Shaffer who are named herein as co-conspirators but not indicted, to defraud the United States out of certain monies

by fraudulently inflating the cost basis of the tuition rate and by fraudulently inflating and increasing the cost to be charged to the Veterans Administration of furnishing to said veterans the books, supplies and equipment necessary for the satisfactory pursuit and completion of the courses of education and training in which they were enrolled."

The indictment went on to allege that: "It was a part of said scheme and plan that the defendants Morgan Bird, Sr., and Alfred Lee Weinberg would not permit the said Schools to purchase consumable instructional supplies, and books, supplies, and equipment at the lowest possible cost available to said Schools but would organize a separate and independent corporation, the Mercury Distributors, Inc., which would be used by said defendants for the purpose of purchasing consumable instructional supplies and the books, supplies, and equipment at the lowest possible cost and reselling such supplies and material to the various Schools at an increased price far above the actual cost and at a substantial profit to said Mercury Distributors, Inc., and the defendants Morgan Bird, Sr., and Alfred Lee Weinberg. The said defendants agreed that the defendant Weinberg, would direct that orders for such consumable instructional supplies and for books, supplies and equipment be placed by said Schools through the Mercury Distributors, Inc., and that the Mercury Distributors, Inc., would then purchase said supplies and material at the actual cost prices therefor and add to said prices large and inflated mark-ups and then resell the same to said Schools at exorbitant and inflated prices and in excess of the price at which the Schools could themselves purchase consumable instructional supplies and books, supplies and equipment in the open market place. The said defendants agreed

that the defendant Weinberg would cause the aforesaid Schools to represent to the Veterans Administration that the actual and true cost of said consumable instructional supplies and said books, supplies, and equipment was the exorbitant and inflated price which the Schools were required to pay to said Mercury Distributors, Inc., and would cause the said Schools to submit to the Veterans Administration an inflated cost of operation as a basis for determining the tuition rate to be paid said Schools and to present vouchers and claims upon the United States to the Veterans Administration for reimbursement for the cost of said books, supplies, and equipment at the inflated prices."

The so-called conspiracy statute under which the above indictment was brought, 18 U.S.C. § 371, reads:

> "If *two or more persons conspire* either to commit any offense against the United States, or *to defraud the United States, or any agency thereof in any manner or for any purpose*, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *" (Emphasis supplied).

We are concerned here with only the second part of this statute which we have emphasized above. In other words the crime charged by the Government is not a conspiracy to commit an offense against a particular section of the Veterans Act but rather an ordinary conspiracy to defraud the United States or an agency thereof. Appellants allege that the indictment does not set forth sufficient facts to charge this crime. We think it does.

The scheme as asserted by the Government was simple and effective. The defendants inflated the cost basis of

the schools by creating a dummy corporation (Mercury) through which they sold supplies and tools to the schools taking an unwarranted middleman's profit. Appellants protest at length that there was no manipulation of the accounts of Mercury or the schools and therefore no crime. The vice of the situation as urged and proved by the Government was not entries false on their face but the basic wrong of foisting upon the true expense for the schools, the school owners and managers themselves as an utterly unnecessary selling agent which collected an unconscionable profit completely contrary to the intent of the Act.

The premise of the Government's fundamental contention was firmly established. The appellants, admittedly owners of the schools involved, were shown to be the real organizers and owners of the Mercury corporation which furnished the supplies and materials to the schools. There was credible evidence that the schools could have bought those items direct from the manufacturers at the same low wholesale prices as Mercury and that the total overpayment by the Veterans Administration to the schools based on the percentage of gross profit to Mercury was $67,407.30.[1] According to Government proof $15,025.88 of this was for tools not even purchased by the schools or Mercury.

To the extent that a legal apparatus was used to achieve a fraudulent end, this case is analogous to the situation that confronted the Supreme Court two years ago in Lutwak v. United States, 344 U.S. 604 (1953). Lutwak and his co-defendants were convicted of conspiring to defraud the United States by obtaining the illegal entry of three aliens into the United States. The method used was

[1] Whether the conspiracy was actually successful to this degree is not relevant.

to have three honorably discharged veterans journey to Paris and marry three aliens who would then be brought into this country under the War Brides Act. Answering the contention, seriously urged, that the conspiracy "was not unlawful because the marriages involved were valid marriages", the majority of the Supreme Court stated at page 611:

> "We do not believe that the validity of the marriages is material. No one is being prosecuted for an offense against the marital relation. We consider the marriage ceremonies only as a part of the conspiracy to defraud the United States and to commit offenses against the United States. In the circumstances of this case, the ceremonies were only a step in the fraudulent scheme and actions taken by the parties to the conspiracy. By directing in the War Brides Act that 'alien spouses' of citizen war veterans should be admitted into this country, Congress intended to make it possible for veterans who had married aliens to have their families join them in this country without the long delay involved in qualifying under the proper immigration quota. Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship; that petitioners so believed is evidenced by their care in concealing from the immigration authorities that the ostensible husbands and wives were to separate immediately after their entry into this country and were never to live together as husband and wife. The common understanding of a marriage, which Congress must have had in mind when it made provision for 'alien *spouses*' in the War Brides Act, is that the two parties have undertaken to establish a life together

and assume certain duties and obligations. Such was not the case here, or so the jury might reasonably have found."

In our own case the validity of the corporate organization of Mercury is not material. Nor do we dispute the right of a bona fide middleman in appropriate circumstances to a legitimate profit. Here, however, the formation of Mercury by the school directors constituted an important step in their scheme to defraud the Veterans Administration, an agency of the United States, by inflating the costs of the schools.

Congress passed the "Servicemen's Readjustment Act of 1944" in order to "provide Federal Government aid for the readjustment in civilian life of returning World War II veterans." 58 Stat. 284 (1944). The educational features of the Act gave eligible veterans the opportunity to obtain vocational training at the Government's expense. To this end, the Act empowered the Veterans Administrator to pay to the training institution which the veteran attended "the customary cost of tuition" and to "pay for books, supplies, equipment, and other necessary expenses * * *;" and where there was "no established tuition fee" the Administrator was to provide for "fair and reasonable compensation * * *." 58 Stat. 289 (1944). Under the Veterans Administration regulations, the school was required to submit cost data annually in order to aid the Veterans Administration in determining the proper tuition rate. As for supplies, each institution was required to "assure itself that the Veterans' Administration is not billed at an unreasonable price." 38 C.F.R. § 21.539(e).

If within the scope of this high purposed Act school directors can line their own pockets by deliberately organiz-

ing and using one unnecessary corporate middleman, then it is as fair for them to use three or four intervening corporations thus raising the ultimate government-borne cost by three or four unnecessary mark-ups. The intent and language of the legislation together with the regulations promulgated thereunder persuade us that Congress did not wish either to legitimize or to underwrite such unscrupulous scheming. As the indictment asserts, we think "it was understood that the cost charged by the Schools to the Veterans Administration would be the actual, real, true, and accurate cost of such books, supplies, and equipment."

In United States v. Furer, 47 F. Supp. 402 (S.D. Calif. 1942), a trial quite similar to this one, Lockheed and Vega Aircraft Corporations had "cost plus fixed fee" contracts with the United States Government for the construction of military airplanes. Furer and his co-defendants were indicted for conspiring to defraud the United States. Their fraudulent plan was to procure subcontracts for parts from Lockheed and Vega by bribing employees of those corporations. Unlike our situation, there was no allegation that the United States suffered any pecuniary loss. Nevertheless the court overruled demurrers to the indictment and stated at page 405:

> "Through the arrangement, set forth in the indictment, for the construction of airplanes on a 'fixed fee' or 'cost-plus fee contract', the airplane corporations became the agents of the United States in letting the contracts (or subcontracts) for parts.
>
> * * *
>
> "For, by the bribery of the employees of the corporations, the Government is deprived of open and competitive bidding in the letting of its contracts. And considerations of worth, which should enter into awards

of contracts in fulfillment of governmental undertakings, are brought to naught."

In the case at bar there was no need for the officers of Mercury to bribe the employees of the schools (who were for this purpose representing the interests of the United States) since they themselves operated the schools and saw to it that Mercury received the business. Cf. Pan American Co. v. United States, 273 U. S. 456 (1927).

For the reasons stated, we hold that the crime of conspiring to defraud the United States is adequately charged by the present indictment. See also Haas v. Henkel, 216 U.S. 462 (1910); United States v. Keitel, 211 U.S. 370 (1908); Heald v. United States, 175 F. 2d 878 (10 Cir. 1949), cert. denied 338 U.S. 859 (1949); Chevillard v. United States, 155 F. 2d 929 (9 Cir. 1946); United States v. Gonzales, 56 F. Supp. 995 (D. Mass. 1944).

Appellants' second contention is that there was no proof of a criminal conspiracy, specifically that no evidence was submitted to show that the Veterans Administration relied on the cost statements in fixing the tuition rates and that no testimony pointed to any fraudulent increase in school costs.

The testimony overwhelmingly showed that the defendants organized Mercury to inflate those costs, that such costs were in fact inflated far beyond what the schools could have and should have paid for the same material elsewhere, and that the administrative heads of the five schools were instructed to place all their orders for supplies and tools through defendant Weinberg. To what extent the Veterans Administration was fooled by this unseen[2] artificial cost mark-up is not clear, nor is it important. The

[2] Defendant Weinberg at first refused the Veterans Administration permission to examine the books of Mercury.

intent to defraud the Government by their actions is plain. That is what they were indicted for and that is what the Government proved.

We now proceed to the points raised with respect to the conduct of the trial.

Appellants urge that the reading to trial witnesses Shaffer, O'Brien and Yekel of a part of their grand jury testimony was improper. The ground asserted to us is that there was no foundation laid for this. The actual extent of the preliminary background necessary to support such use of grand jury minutes is within the discretion of the trial judge. In the instances cited to us that discretion was not abused. Nor was there any transgression in his method of handling the disputed testimony. This was a straightforward reading of the requested portions of the grand jury minutes for the legitimate purpose of refreshing the recollection of the witnesses in accordance with the practice approved in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 232-234 (1940).

Under this topic appellants argue that failure of the judge to directly tell the jury in his charge how they were to regard the grand jury testimony was especially prejudicial in the light of the court's statement that it would instruct the jury on the purposes for which it was received. The court quite evidently overlooked this in its main jury instructions. Immediately following these, appellants' counsel at their request conferred with the court at side bar; they took numerous exceptions, the discussion going on for twelve printed pages of the appendix. Counsel covered everything they had and said nothing about what they are now complaining. The court then further charged the jury regarding some of the defense thoughts. After

that the attorneys for both appellants addressed the court as to the supplemental charge and took an additional exception but they made no request of or comment to the court with respect to charging on the purpose of the reading of the grand jury testimony.

Irrespective of the non-action of the attorneys let us see what the omission to so charge amounted to. With respect to Shaffer who agreed with his grand jury testimony it was harmless. O'Brien, the second grand jury witness, stated that before the grand jury he had been asked and had answered all of the questions and answers read to him with the exception of two answers which he did not recall "as such". The failure to cover this in the charge was a minor fault.

There remains the lack of mention in the charge of the Yekel grand jury testimony. This witness had been president of and in charge of Mercury during the critical period. He had been employed by appellant Weinberg for some years prior to that and had continued taking care of the latter's affairs without compensation after he went with Mercury. He was almost the last witness called by the Government in its main case. By that time it had established the conspiracy of the defendants to defraud the United States as outlined in the indictment.[3] The net re-

[3] After some preliminary inquiry there were the following questions of Yekel and answers by him on direct examination:

"Q. Now tell me some more about the meeting with Mr. Bird at his office with Mr. Weinberg, that is Mr. Bird's office with Mr. Weinberg. A. Down in Plymouth you mean?

Q. Yes. A. The only thing I could recall is we went down, I went down with Mr. Weinberg, and Mr. Bird was in his office, we went in and sat down and we talked about Mercury's possibilities in writing to certain companies in mining lines, equipment and supplies, that is all.

Q. Did you discuss the question of purchasing tools and consumable supplies for schools? A. I don't think we did.

Q. Did you have any discussion about who your potential customers were? A. No, we never did.

(Footnote continued on following page.)

sult of his testimony is that he did not essentially contradict his grand jury evidence. He played with words, he seized any opportunity presented by the questions to re-

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(Footnote continued from preceding page.)

Q. Did you have any meeting with Mr. Bird and Mr. Weinberg at which you discussed the sale of tools and supplies to the schools operated by Mr. Bird and Mr. Weinberg? A. I didn't, no.

Q. You are sure you didn't? A. No.

Q. Did you ever have any discussion with Mr. Bird and Mr. Weinberg with regard to the sale of tools to the schools? A. Not that I could recall.

Q. And the question of mark up in price from which Mercury bought it and the price you were going to get from the school? A. We never sat down and discussed anything like that.

Q. You never discussed that? A. No.

By Mr. Matlack: Under the authority of the Socony Vacuum case I will ask the Court to put the following questions and answers which the witness made to the grand jury."

The motion was granted over objection. The court then read to the witness questions and answers from his grand jury testimony as follows:

"'Q. Who determined that? A. *Well, at the meeting we determined the prices that we are going to sell for.*'

Were you asked that question and did you make that answer?

By the Witness: *I made that answer to the grand jury, but that isn't the question Mr. Matlack just asked me now.*

By the Court: You made that answer to the grand jury?

By the Witness: Yes, sir.

By the Court: 'Q. What was said on that? A. We decided to stick right close to the companies catalogs.

Q. I am not asking you that. I asked you what the discussion was, sir. Who said that we are going to write these prices up to the schools? A. Well, Mr. Weinberg usually had—

Q. Did Mr. Weinberg determine that policy? A. He determined the policy.

Q. He determined the policy? A. Yes.

Q. Was Mr. Bird acquainted with that policy? A. He should have been.

Q. It was discussed at the meetings he was present and you were present? A. Yes.

Q. About the upping of the prices? A. That is right.

Were you asked those questions and did you make those answers?

By the Witness: If I was asked the questions I made the answers. Maybe I wasn't clear at the time I made the answers.

By the Court: *Did you make those answers?*

By the Witness: *Yes, I did.*" (Emphasis supplied).

The witness then said the discussion of marking up the price did not happen at a meeting, that "I never *sat down* and discussed marking up prices with them [Weinberg and Bird]." (Emphasis supplied). He said "Mr. Weinberg and I had discussions on the catalogs that we used for equipment that we were selling." He said "I never talked to anybody about marking up prices." The court asked him: "Did you tell the grand jury you did?" The witness answered: "I might have told the grand jury he did. I might have misunderstood the question at the time. I was under pressure up there." A little later he gave the following testimony: "Q. But you did discuss the

(Footnote continued on following page.)

strict his previous answers, he readily distinguished between a meeting and an informal discussion, between the word "mark up" being actually used and the decision to make the schools pay retail prices for the merchandise sold them by Mercury. But the facts come through and the total effect is a republishing of the story given to the grand jury.

So what we have finally is that although he was declared hostile to the Government there is no real contradiction between his trial admissions relative to former evidence and that evidence. We therefore have no problem of neutralization of evidence and it was not major error to neglect a limiting instruction with regard to the use of the grand jury testimony. See Curtis v. United States, 67 F.2d 943 (10 Cir. 1933); Ellis v. United States, 138 F.2d 612, 621 (8 Cir. 1943).[4]

Appellants also claim that the court failed to instruct on numerous other vital issues concerning which during

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(Footnote continued from preceding page.)
question of prices with Mr. Weinberg when Mr. Bird was present, is that so? A. He may have been there. I can't say definitely. He was there at different times. Q. At no occasion? A. We never had a *specific* meeting or gathering or anything where we *sat down*, the three of us, and discussed anything about prices or anything. Q. *Informal discussions you mean?* A. *That is right.*" (Emphasis supplied). Pressed as to who gave those instructions the witness said: "Well, that is the way it was with Mr. Weinberg when I was employed by him." By the Court: "Did anybody instruct you specifically to do it for Mercury?" By the Witness: "Nobody instructed me specifically to do it for Mercury, but, as I said, I worked with Mr. Weinberg and that was our policy." He was asked by the court *"Was there a mark up to the schools more than there was to Scott* [a supplier]?" and he answered "Yes". (Emphasis supplied).

It is clear from Yekel's evidence and from that of Weinberg that the so-called manufacturer's catalog or list price is the retail sales price suggested by the manufacturers to the distributors, material men and suppliers purchasing from them. Weinberg said as to this:

"Q. So that the manufacturers list price was the price at which you sold it, is that correct? A. That is correct.

Q. *And included a mark up from the price at which you bought it from the manufacturer?* A. *That is correct, sir.*" (Emphasis supplied).

[4] Appellants maintain that they should have been permitted to examine all of the evidence given by the three witnesses to the grand jury. The court offered to give them that part which had been read to the witnesses and the offer was declined. Under the trial circumstances there was no substantial error in that ruling. See United States v. Socony-Vacuum Oil Co., *supra*.

the course of the trial it had stated it would. Twenty-five references to such alleged instances are given, including the above discussed point *re* the grand jury testimony. Three others are signalled out in appellants' brief for detailed attention. Two of these involve Louis Shaffer, an attorney, who was named as a conspirator in the indictment but not indicted. He acted for the appellants in organizing the schools involved and the Mercury company. He kept the minute books, attended to the issuance of the stock of the various corporations and performed the duties of secretary of each corporation. He executed and endorsed notes for the Parker Body & Fender School (one of Appellants' schools) and for Mercury which were discounted at the Wyoming National Bank in Wilkes-Barre. Shaffer was called as a witness by the Government. He was shown Government exhibit #46, a note of the Parker School by defendant Weinberg, president, and Shaffer, secretary, to the order of Weinberg and Shaffer. He said he endorsed it as a matter of convenience for a client and named Weinberg as the client. The Government then asked the court to read to the witness certain questions and answers from his grand jury testimony. The court complied under the authority of United States v. Socony-Vacuum Oil Co., supra, which permits the reading of such questions and answers to refresh the recollection of the witness. Shaffer agreed that he had told the grand jury that he was the attorney for the Parker School and represented the undisclosed interest of the witness Bird. Shown Government exhibit #47, a note of Mercury to Weinberg and Shaffer given for a loan of Mercury by the Wyoming Bank, he said he still represented Bird when he endorsed it. At that point the court said it would instruct regarding Shaffer's testimony as to Weinberg and Bird and "* * * whether or not one is bound by the other". In his charge the trial judge said, "The act of one partner in crime is admissible against

the others where it is in furtherance of the criminal undertaking. All such responsibility of one for the other ends when the conspiracy ends." The court could have pointed more emphatically at the particular Shaffer testimony but beyond doubt it covered the court's earlier statement.

The second Shaffer incident arose from the following defense cross-examination question asked of Shaffer: "Mr. Shaffer, in all of the dealings with Alfred Lee Weinberg and Morgan Bird, Sr., did Alfred Lee Weinberg and Morgan Bird, Sr., unlawfully conspire, confederate and agree with you, named as a co-conspirator in this indictment to defraud the United States out of certan monies by fraudulently inflating the cost basis of the tuition rate and by fraudulently inflating and increasing the cost to be charged to the Veterans Administration of furnishing to the said veterans the books, supplies, and equipment necessary for the satisfactory pursuit and completion of the courses of education and training in which they were enrolled?" The question was objected to as calling for an improper conclusion which it palpably did. In sustaining the objection the judge told the jury that "* * * there have been questions here as to confidential relationships between lawyers and clients. There are certain times when that relationship ends. There are certain times when that privilege is not present. We will instruct you appropriately at a later time in this proceeding." Manifestly the court's remarks had no immediate allusion to the erroneous question but related to the earlier defense objection to Shaffer testifying at all. That had been the subject of extensive discussion at that time and the objection had been actually overruled.[5]

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[5] In Clark v. United States, 289 U.S. 1, 15 (1933), Mr. Justice Cardozo held under facts akin to those before us that "The attorney may be innocent, and still the guilty client must let the truth come out." And see *infra* under detailed discussion of the Shaffer testimony.

The third occurrence concerns Bird's objection to the reading of Weinberg's testimony before the grand jury. This too, though not precisely identified, was embraced within the court's charge language above quoted in connection with the first Shaffer episode.

We have checked out the remaining twenty-one references. These are inconsequential with most of them generally within the court's charge.

Appellants also assign reversible error to that part of the charge reading "May I say to you in this case that there are two defendants. You can not convict one and acquit the other. You must either acquit the two or none at all, or convict the two or none at all. In other words, one person alone can not commit conspiracy."

The court's theory on this was that the testimony did not show participation in the conspiracy by any person other than the defendants; therefore that the naming of the other three as co-conspirators was a nullity. Even assuming the trial judge was in error in this part of his charge it was a mistake favorable to the defense. Appellants contend in their brief that "* * * the jury may well have concluded that the prosecution had proven a conspiracy by only one of the named defendants with the other three named in the indictment, but not indicted nor made defendants. The jury, however, could not assert such a conclusion in the face of the trial judge's charge that they could not convict the one without convicting the other." Appellants overlook that the judge charged the jury in words that could not be misunderstood:

> "You cannot find the defendants guilty as charged in this indictment unless the evidence satisfies you and each and every one of you beyond a reasonable doubt that every element of the offense specified in

the statute upon which such indictment is based has been proved. If there remains any such reasonable doubt as to any such element in the mind of any one of you, there can be no conviction of the defendants upon such count.

"If the Government has satisfied you beyond a reasonable doubt of the truth of what it sets out in the indictment, then your verdict should be guilty. Otherwise, your verdict should be not guilty. The burden of proof rests upon the Government to prove beyond a reasonable doubt every substantive fact necessary to be proved in order to convict the defendants of any crime under this indictment. If the Government fails to do so, the defendants should be acquitted."

And later told the jury:

"Whatever your convictions are before your God and your flag, vote them. Don't be swayed by prejudice for or against the Government, or for or against the defendants, but call them as you see them. That is the American custom—as you see them, the truth, nothing but the truth, so help you God."

And that later in the same paragraph of the charge as the language quoted by appellants the court said:

"If you believe from the evidence in this case that one of the defendants was guilty of certain misconduct, criminal conduct, and the other wasn't, there is no conspiracy." (Emphasis supplied).

The court in its charge confined the crime of the defendants to conspiring with each other. Conspiracy by either defendant with any of the other three persons named as conspirators in the indictment was eliminated. And then the court added that even if the jury found one defendant guilty as charged, if the second defendant was

found, under the charge, not proven guilty beyond a reasonable doubt, the jury was bound to acquit the guilty one because of the court's premise that in such circumstances there had been no conspiracy shown. All this affirmatively lightened the defense task. It was not reversible error. Cf. United States v. McCann, 32 F.2d 540, 542 (2 Cir. 1929), cert. denied 280 U.S. 559 (1929).

Still attacking the charge appellants say that the Government case was unduly emphasized and that the court failed to adequately review the law of the evidence. In this long trial the Government evidence, testimonial and documentary, was far more voluminous than the defense. The judge did review the evidence and of necessity spent more time on that of the prosecution but we fail to see that substantial unfairness to the defense resulted. We have already quoted his strong instructions to the jury in giving that body its fundamental decisional guides. Towards the end of his charge he stressed the necessity of a judge being impartial and said, "*We have no opinion, that is not our department.*" (Emphasis supplied).

With the benefit of only three requests by the defense, and none from all that appears by the prosecution, the court gave the jury a rather thorough charge. It runs forty-five printed pages. It included the elements necessary for the jury to decide the case under their oaths.

Appellants assert that Shaffer's evidence was privileged and should have been excluded. Contrary to their premise we think that prior to Shaffer testifying the Government had made a prima facie showing of conspiracy between the two defendants. Therefore the decision in United States v. Bob, 106 F.2d 37, 40 (2 Cir. 1939), cert. denied 308 U.S. 589 (1939), is very much in point. The court there held, and it is sound law, that an attorney's testimony which

related to conversations and communications with his client during the commission and in furtherance of the crime charged in the indictment is not privileged. See also Clark v. United States, 289 U.S. 1 (1939); In re Selser, 15 N.J. 393 (1954); Note, 24 Fordham L. Rev. 290 (1955).

Part of the testimony of the Federal Bureau of Investigation accountant is the subject of the next point. The witness had examined the books and records of the schools and of the Mercury company. He testified as to the results, including the facts that Mercury and the schools had not purchased sufficient tools to furnish the veterans full sets and that the rent for the Lee School was over stated in its cost statement. We are satisfied that while these might well be independent crimes as appellants suggest they were not unrelated to but an integral part of the overall picture of fraud developed by the Government and evidence as to them was admissible. See Leeby v. United States, 192 F.2d 331, 335 (8 Cir. 1951); Green v. United States, 176 F.2d 541 (1 Cir. 1949).

In an attempt to counteract the tool deficiency evidence certain alleged receipts of veterans students were offered by the defense under the Federal Shop Book Rule (28 U.S.C. 1732). The court refused to permit them. The defense effort was to contradict their own books of Mercury and the schools involved, Northeast and Parker. There had been evidence strongly pointing to tampering with a like receipt or receipts. The books and records of Mecury and the two schools from which the Government accountant had obtained his data were in the courtroom and subject to the defense examination. The judge in effect rejected the receipts as not complying with the intent of the statute, i.e. powerful motive to misrepresent was present together with evidence tending to indicate misrepresentation. See 5 Wigmore on Evidence, § 1527 (3rd ed. 1940). The court

did allow Weinberg to testify of his own knowledge that he knew the required number of tools was furnished. If there was error at all in the ruling we cannot say that it was serious. See McKee v. Jamestown Baking Co., 198 F.2d 551, 556 (3 Cir. 1952).

There is objection by appellants to the exclusion of evidence of three Veterans Administration employees offered to show that Weinberg had no intention of defrauding the United States in forming Mercury or in charging the schools the prices of which the Government complained. Weinberg had been permitted to tell about conversations he had had with Veterans Administration contract officers and others and that they had told him that purchasing from Mercury was satisfactory provided the contract price was not exceeded. Campion, one of the employees offered, would have testified that it was "very possible" Weinberg told him about Mercury. Weinberg himself said he had *not* told Campion "all about Mercury." Of course in this setting Campion with incomplete knowledge could not be used as an opinion witness. What Weinberg said he told Campion was not challenged by the Government. So the harm, if any, in not having Campion testify that it might have happened was slight. In addition, if Campion had so testified and the judge had charged that the jury could consider that testimony, in connection with all the other evidence on the subject and under the rules laid down, on the question of Weinberg's intent, the court would also have been forced to charge that the jury should also have in mind the circumstance that Weinberg had failed to advise Campion fully of his relationship to Mercury and of that concern's complete dealings with the schools.

The second witness was to show that the Veterans Administration functioned by information other than cost statements in determining tuition rates. That evidence was

of no help in corroborating Weinberg's innocent motivation.[6] The last proffered witness would have testified about the Administration at one time withholding payments to the schools because they purchased tools from a company in which the stockholders of the schools had an interest but later resuming such payments after an examination disclosed no legal reason why the funds should be withheld. Those incidents occurred more than a year after the defendants had started their schools. Evidence regarding them had no important bearing, if any, on the question of Weinberg's intent. Cf. Smith v. United States, 188 F.2d 969, 970-71 (9 Cir. 1951). We find no substantial error in the barring of the testimony of these witnesses.

Finally, appellants assert that they were not given a fair trial.

They say that defense counsel were repeatedly and unnecessarily interrupted and argued with by the court; that the court made prejudicial remarks and prejudicial rulings on evidence.

The judge in his charge stated that "there were occasions when we had to stop Mr. Matlack [Government counsel], when we had to stop our friend Mr. Levy [defense counsel], when we had to stop Mr. Rosenn [defense counsel] and when we had to stop Mr. White [defense counsel]." It was in that connection that he stressed the necessity of a judge to be impartial and the fact that he had been and concluded by saying "We have no opinion, that is not our department."

On the whole record we cannot conscientiously hold that the conduct of the district judge resulted in an unfair trial to these appellants. Counsel had decided views and

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[6] There was no assertion in the offer that the defendants were informed of this at the time of their alleged conspiracy. See D'Aquino v. United States, 192 F. 2d 338, 363 (9 Cir. 1951), cert. denied 343 U.S. 935 (1952).

expressed them as did the court. The judge was there to see to it that the trial proceeded and was kept within its reasonable legal boundaries. It was a difficult tedious proceeding over which we think the district judge presided without committing substantial error.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 11,573 and 11,574.

UNITED STATES OF AMERICA,
v.
ALFRED LEE WEINBERG, MORGAN BIRD, SR.,
Appellants.

SUR PETITION FOR REHEARING

Present: BIGGS, Chief Judge, and GOODRICH and McLAUGHLIN, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Dated: October 14, 1955.

By the Court,

McLAUGHLIN,
Circuit Judge.

APPENDIX B.

Provisions of the Federal Constitution and Statutes Involved.

AMEND. V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMEND. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence".

Federal Statutes.

The federal statutes involved are as follows:

Section 371, Title 18 U. S. C.:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than Ten Thousand ($10,000.00) Dollars or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

Section 1732, 28 U. S. C.:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind. June 25, 1948, c. 646, 62 Stat. 945."

Federal Regulation.

Code of Veteran Regulations, Title 38, Section 21.539, paragraph (g) (4):

"The following will be applied relative to the retention and microfilming of necessary records at the educational institution. Receipts taken by educational institution for books, supplies, and equipment, furnished to veteran trainees covering the purchase, issuance, or reissuance of books, supplies, and equipment for veteran trainees will be maintained in good condition for at least a period of 3 fiscal years following the actual date of submission of covering

vouchers to the Veterans' Administration. The receipts involved for books, supplies, and equipment ordinarily constitute the best evidence of the fact that books, supplies, etc., were furnished to veteran trainees, and so will be retained and kept available for audit purposes for three years * * *."

Pennsylvania Statute.

"Nor shall counsel be competent or permitted to testify to confidential communications made to him by his client or the client be compelled to disclose the same, unless in either case this privilege be waived upon the trial by the client (1887, May 23, P. L. 158, Sec. 5, cl. (d)." (28 Purdon's Penna. Statutes, Sec. 321).

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